Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

J. LARRY BRADSHAW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should this Court grant certiorari to resolve the conflict among the circuits regarding the standards of review to be utilized by the United States Courts of Appeals in reviewing decisions of the United States District Courts determining the liability of an individual for a penalty under section 6672(a) of the Internal Revenue Code (26 U.S.C.) relative to unpaid employment taxes owing by the individual's employer?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, J. Larry Bradshaw, respectfully prays that a Writ of Certiorari be issued to determine the appropriate standards of review to be utilized by the United States Courts of Appeals in reviewing the decisions of the United States District Courts determining the liability of an individual for a penalty under section 6672(a) of the Internal Revenue Code (26 U.S.C.).

OPINIONS BELOW

On September 3, 1993 the United States District Court for the District of Utah issued Findings of Fact and Conclusions of Law which determined the Petitioner was not liable for a penalty under section 6672(a) of the Internal Revenue Code (26 U.S.C.) with respect to unpaid employment taxes owing by a corporation of which the Petitioner was an officer. The original Judgment of the United States District Court for the District of Utah was issued on October 20, 1993. By Order dated December 23, 1993, the United States District Court for the District of Utah issued an amended Judgment dated December 23, 1993. The decision of the District Court was appealed to the United States Court of Appeals for the Tenth Circuit.

On December 4, 1995, the United States Court of Appeals for the Tenth Circuit issued its Opinion, reversing the decision of the District Court as to the liability of the Petitioner for the penalty allowed under section 6672(a) of the Internal Revenue Code (26 U.S.C.). The Court of Appeals designated the Opinion for publication.

On April 18, 1996, the United States Court of Appeals for the Tenth Circuit issued its Order on Rehearing, denying the Petitioner's petition for rehearing. The Court of Appeals designated the Order on Rehearing for publication.

STATEMENT OF JURISDICTION

Petitioner seeks review of the Opinion of the United States Court of Appeals for the Tenth Circuit and its judgment of December 4, 1995, and a determination of the appropriate standards of review for use by the United States Courts of Appeals in reviewing decisions of the United States District Courts determining liability under section 6672(a) of the Internal Revenue Code (26 U.S.C.).

Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. 1254(1).

STATUTES INVOLVED IN THIS CASE

Section 6672(a) of the Internal Revenue Code (26 U.S.C.) provides as follows:

> "(a) GENERAL RULE – Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or

not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable."

STATEMENT OF THE CASE

Petitioner, J. Larry Bradshaw, was an officer of Heritage Building Products (HBP). HBP failed to pay over to the government federal income tax withheld from employees and F.I.C.A. tax withheld from employees as required under the Internal Revenue laws. At the time at which the withheld employment taxes were due to be paid, the financial operations of HBP were controlled by a bank.

The Internal Revenue Service assessed against Petitioner a penalty under section 6672(a) of the Internal Revenue Code (26 U.S.C.) in the amount of the withheld employee taxes which were not remitted to the Internal Revenue Service by HBP.

Petitioner paid a portion of the assessment, and filed a Claim for Refund and Request for Abatement with the Internal Revenue Service. After pursuing administrative remedies to no avail, Petitioner filed a suit for refund in the United States District Court for the District of Utah on May 14, 1992. The defendant, United States of America, filed an Answer and Counterclaim against Petitioner on approximately July 6, 1992. Petitioner filed an Answer to the Counterclaim on August 25, 1992.

The matter came before Judge J. Thomas Greene of the United States District Court for the District of Utah for bench trial on June 4, 1993.

The main issues for determination by the District Court were: whether the operational situation between HBP and the bank was such that the Petitioner was not a responsible person within the meaning of section 6672(a), and, if the Petitioner was a responsible person under section 6672(a), whether the Petitioner willfully failed to pay to the Internal Revenue Service the employment taxes withheld by HBP.

Judge Greene issued written Findings of Fact and Conclusions of Law on September 3, 1993 in favor of the Petitioner. The District Court held the Petitioner was not a responsible person under section 6672(a) and also that the Petitioner did not willfully fail to remit payment of the withheld employment taxes to the Internal Revenue Service on behalf of HBP. The Judgment of the District Court was issued on October 20, 1993.

Motions to Enlarge the Time to Object to the Proposed Form of Judgment and to Amend the October 23, 1993 Judgment were filed by the United States on November 2, 1993. Petitioner filed a Memorandum in Opposition to the Motions to Enlarge the Time to Object to the Proposed Form of Judgment and to Amend the Judgment, and a Motion for Attorney's Fees and Costs under Fed. R. Civ. P. 11 on November 16, 1993.

Following consideration of the Motions by the United States and the Memorandum in Opposition filed by Petitioner, the District Court entered an Order amending the

October 23, 1993 Judgment and issued an amended Judgment on December 23, 1993.

The United States filed a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit from the October 23, 1993 judgment of the District Court on December 20, 1993. The Notice of Appeal was amended by the United States on February 18, 1994 under Fed. R. App. P. 4(a)(4).

On December 4, 1995, following oral argument, the United States Court of Appeals for the Tenth Circuit issued its Opinion reversing the decision of the District Court as to the liability of the Petitioner for the penalty under section 6672(a). The Court of Appeals designated the Opinion for publication.

In reversing the decision of the District Court, the Court of Appeals stated that based on the court's recent decision in *Taylor v. Internal Revenue Service*, 69 F.3d 411 (10th Cir. 1995), the appropriate standard for review of the District Court's determination as to whether or not the Petitioner was a "responsible person," was a *de novo* standard as distinguished from a clearly erroneous standard as contended by the Petitioner. The Court of Appeals also stated that the appropriate standard for review of the District Court's determination as to whether or not the Petitioner willfully failed to remit payment of the withheld employee taxes was a clearly erroneous standard.

The Court of Appeals acknowledged that the use of the *de novo* standard for review of a district court's determination regarding responsibility, conflicted with the

decisions of five other circuits and was in conformity with the decisions of two other circuits.

Furthermore, in stating that the clearly erroneous standard was the appropriate standard for review of a district court's determination regarding willfulness under section 6672(a), the Court of Appeals acknowledged that the use of this standard was in conflict with other circuits however the Court of Appeals for the Tenth Circuit had in prior decisions treated the willfulness question as an issue of fact and would therefore apply the clearly erroneous standard.

Petitioner submitted a Petition for Rehearing to the United States Court of Appeals for the Tenth Circuit on January 17, 1996. The Court of Appeals filed an Order on February 1, 1996 filing Petitioner's Petition for Rehearing and requiring the United States to file a response to the petition on or before February 16, 1996. The Court of Appeals filed an Order on February 20, 1996 granting the United States' Motion for an extension of time in which to file a response to the Petition for Rehearing until February 23, 1996.

On April 18, 1996, the United States Court of Appeals for the Tenth Circuit issued its Order on Rehearing, denying the Petitioner's Petition for Rehearing. The Court of Appeals designated the Order on Rehearing for publication.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO THE APPROPRIATE STANDARD OF REVIEW TO BE UTILIZED BY THE UNITED STATES COURTS OF APPEALS IN REVIEWING DECISIONS OF THE UNITED STATES DISTRICT COURTS WHICH DETERMINE THE LIABILITY OF AN INDIVIDUAL FOR A PENALTY ASSESSMENT UNDER SECTION 6672(a) OF THE INTERNAL REVENUE CODE (26 U.S.C.)

A conflict exists among the circuits of the federal judicial system as to the appropriate standard of review for the two issues posed under section 6672(a) of the Internal Revenue Code (26 U.S.C.). The two issues contained in section 6672(a) are: whether or not an individual is a responsible person as defined by the statute, and whether or not an individual who has been determined to be a responsible person under the statute, willfully failed to remit withheld employee taxes to the Internal Revenue Service on behalf of an employer.

As the Court of Appeals for the Tenth Circuit acknowledged, the use of the *de novo* standard for review of a district court's determination regarding responsibility placed the Court of Appeals for the Tenth Circuit in conformity with the decisions of two other circuits and in direct conflict with the decisions of five other circuits.

The Courts of Appeals for the Second, Tenth and Eleventh Circuits have held that the determination of whether an individual is a responsible person under section 6672(a) is subject to *de novo* review on appeal.

The Courts of Appeals for the First, Fifth, Sixth, Seventh and Ninth Circuits have held that the determination of whether or not an individual is a responsible person under section 6672(a), is subject to review on appeal under the clearly erroneous standard.

Furthermore, in stating that the clearly erroneous standard was the appropriate standard for review of a district court's determination regarding willfulness under section 6672(a), the Court of Appeals for the Tenth Circuit acknowledged that the use of this standard in reviewing this issue was also in conflict with other circuits.

The Courts of Appeals for the Second and Eleventh Circuits have held that a determination of whether or not a "responsible person" willfully failed to remit withheld employee taxes to the Internal Revenue Service under section 6672(a) is subject to *de novo* review.

Through its holding in this case, the United States Court of Appeals for the Tenth Circuit has acknowledged that a conflict exists between the circuits regarding the appropriate standard of review on each of the issues contained within section 6672(a). In addition, the opinion of the Tenth Circuit accentuates that the standards of review which are being applied to the two issues contained with section 6672(a) are also inconsistent within the Tenth Circuit.

A uniform standard of review throughout the federal judicial system in cases involving the administration of the income tax laws is essential. Uniform administration of the income tax laws throughout the country serves to promote equality and fairness among taxpayers. Such uniformity is mandatory inasmuch as the tax system is

essentially a self-regulating system. Taxpayers, whether currently involved in litigation or not, are entitled to the assurance that judicial review of their matters will be handled on a basis consistent with those of taxpayers in other jurisdictions.

A defined singular standard for use by the United States Courts of Appeals in reviewing determinations of the United States District Courts, the United States Tax Court and the United States Court of Federal Claims under section 6672(a) is essential to a consistent, uniform administration of the federal tax laws.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted to resolve the existing conflicts between the circuits.

Respectfully submitted,

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APPENDIX A

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

J. LARRY BRADSHAW, Plaintiff-Counterclaim Defendant-Appellee, v. UNITED STATES OF AMERICA, Defendant-Counterclaimant-Appellant.	)	No. 94-4018 No. 94-4064

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 92-C-428-G)

(Filed Dec. 4, 1995)

J. Jay Bullock, Salt Lake City, Utah, for Plaintiff-Counterclaim Defendant-Appellee.

Bruce R. Ellisen, Attorney, Tax Division, Department of Justice, Washington, D.C. (Loretta C. Argrett, Assistant Attorney General, and Jonathan A. Wasserman, Attorney, Department of Justice, Washington, D.C., and Scott M. Matheson, United States Attorney, Salt Lake City, Utah, with him on the brief), for Defendant-Counterclaimant-Appellant.

Before **TACHA** and **HOLLOWAY**, Circuit Judges, and **ELLISON**,* District Judge.

HOLLOWAY, Circuit Judge.

The government as Defendant-Appellant appeals from a judgment of the district court awarding Plaintiff-Appellee J. Larry Bradshaw a judgment against the United States with respect to a penalty assessment against plaintiff under 26 U.S.C. § 6672 for failure to pay over withholding taxes. Jurisdiction in this court is proper under 28 U.S.C. § 1291.[1]

I

Plaintiff-Appellee J. Larry Bradshaw was president of Heritage Building Products (HBP) during the last quarter of 1985 and the first three quarters of 1986. I App. at 69. HBP was wholly owned by Heritage Corporation. Bradshaw was president of Heritage Corporation and

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*The Honorable James O. Ellison, Senior United States District Judge for the Northern District of Oklahoma, sitting by designation.

[1] On March 9, 1994, we entered an order directing the parties to file supplemental briefs addressing whether we have jurisdiction "where the notice of appeal was filed while a timely served motion to amend was pending before the district court." We have reviewed the record and the supplemental submissions and agree with the parties that the government complied with the requirements of Fed. R. App. P. 4(a). Thus there is no jurisdictional defect, and we will consider the merits of both No. 94-4018 and No. 94-4064, which present the same issues on this single controversy.

owned 13% of its stock. Bradshaw was also on the board of directors of both corporations. *Id.* at 66, 69; II App. 152.

HBP had a line of credit from Zions First National Bank (the Bank). I App. 69-71. On May 10, 1985, Bradshaw, on behalf of HBP, entered into a new credit arrangement with the Bank (the Agreement), whereby the Bank established for HBP a revolving line of credit in the amount of $650,000. *Id.* at 69-71; II App. 239-61. As part of the Agreement, HBP granted the Bank liens on all of HBP's assets and the right to freeze any of HBP's accounts with the Bank in the event of a default. II App. 254-55.

On March 15, 1986, the Bank determined that HBP had defaulted and therefore, pursuant to the Agreement, froze all of HBP's accounts. I App. at 80-84. Thereafter, any funds received by HBP were deposited into a "control account." HBP could not transfer funds from this account to its operating account without the Bank's approval.

Beginning on May 29, 1986, the Bank allowed HBP to disburse funds from its operating account; however, the Bank's approval was required for each disbursement. *Id.* at 101-02. The Bank would not honor checks that were not pre-approved by it. *Id.* The Bank approved some payments, such as payment of an insurance premium, payments to Bradshaw for services rendered, and payment of net wages to employees,[2] but repeatedly refused to

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[2] HBP employees' wages were paid from a payroll account at another bank, First Interstate. The Bank approved the transfer of funds to this payroll account. However, the Bank did not

approve payment of federal and state withholding taxes, despite Bradshaw's requests that those payments be authorized. *Id.* at 89-90, 101-02, 114-16; II App. at 149. Bradshaw, on behalf of HBP, signed the checks for the payments the Bank approved. *See* II App. at 267-71.

In early 1986, prior to the freeze, Bradshaw personally lent HBP $40,000. *Id.* at 283-84. These funds were used to pay $15,000 in payroll and to pay $25,000 of interest to the Bank. *Id.* After the freeze, Bradshaw again lent $40,000 to HBP, which was used to pay $25,000 in interest to the Bank and $15,000 to suppliers. *Id.*

HBP failed to pay its federal withholding taxes to the IRS in the first three quarters of 1986 and a penalty for the late payment of taxes for the fourth quarter of 1985. In August 1986 Bradshaw, on behalf of HBP, entered into an agreement for voluntary liquidation and HBP ceased doing business in September 1986. Supp. App. at 75-106; I App. at 65.

Pursuant to 26 U.S.C. § 6672 the IRS assessed a 100% penalty ($75,601.01) against Bradshaw as a responsible person who willfully failed to collect or truthfully account for and pay over to the United States federal withholding taxes for the first three quarters of 1986 and for failure to pay the penalty for the late payment of the fourth quarter 1985 taxes.

Bradshaw brought a refund suit seeking the return of $438.60 he had paid as a partial payment of the penalty. The government counterclaimed for the balance of the

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control the amounts held in the payroll account. II App. at 177-78.

assessment. After a bench trial, the district court found in favor of Bradshaw, concluding that Bradshaw was not a "responsible person" within the meaning of § 6672 because he had no power to disburse any of HBP's funds without the Bank's approval. The judge also concluded that because of the Bank's "complete control of the company's accounts and assets," Bradshaw's failure to pay the taxes was not willful. The court entered an amended judgment for Bradshaw in the amount of $34,578.54, and the government appealed.[3]

II

Under 26 U.S.C. § 6672(a) (1988):

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or

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[3] The judgment greatly exceeded the amount which Bradshaw had originally sought for two reasons. First, Bradshaw had made additional partial payments of the penalty at issue here during the pendency of the suit. Thus, at the time of judgment, his partial payments totaled $27,764.54. I App. at 49. In addition, the parties agreed that Bradshaw had overpaid his 1991 taxes in the amount of $6,814. *Id.* Although the government maintained that Bradshaw could not recover this latter amount in this action because it was not related to the liabilities at issue, the district court included that amount in its judgment. The government has raised no issue or objection addressing that portion of the judgment, which thus is unaffected by our disposition. Our conclusions in Part III, *infra*, deal with these amounts which, as explained, were included in the district court's judgment.

> defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. . . .

"When a corporate employer neglects to pay the required [federal withholding] taxes, section 6672(a) authorizes the Government to assess the full amount of taxes due against the corporation's responsible officers in the form of a penalty." *Howard v. United States*, 711 F.2d 729, 733 (5th Cir. 1983). This penalty is distinct from and in addition to the employer's liability for these taxes. *Id.* "The § 6672 penalty may be assessed against (1) any responsible person (2) who has willfully failed to collect, account for, or pay over federal employment taxes." *Muck v. United States*, 3 F.d 1378, 1380 (10th Cir. 1993). Arguing for reversal, the government says that Bradshaw was a responsible person who willfully failed to collect, account for, or pay over the withholding taxes, and that the district court's conclusions to the contrary were in error.

A. Responsible Person

1. Standard of Review

The government argues that the ultimate determination that Bradshaw was not a responsible person is a question of law subject to *de novo* review. Appellant's Opening Brief at 12. Bradshaw, on the other hand, argues it is a question of fact subject to the clearly erroneous standard of review. Appellee's Brief at 13-14.

We have recently resolved this question. In *Taylor v. Internal Revenue Service*, ___ F.3d ___ (10th Cir. No.

94-5162, slip op. at 7), we held that the ultimate determination whether an individual is a "responsible person" within the meaning of 26 U.S.C. § 6672 involves an application of law to fact which is subject to *de novo* review on appeal. This holding agreed with the views of the Second and Eleventh Circuits. *See United States v. McCombs*, 30 F.3d 310, 319 (2d Cir. 1994); *Hochstein v. United States*, 900 F.2d 543, 547 (2d Cir. 1990); *Thibodeau v. United States*, 828 F.2d 1499, 1503 (11th Cir. 1987). We disagreed with other circuits.[4]

2. Was Bradshaw a Responsible Person?

Courts have generally given a broad interpretation to the term "responsible person" under § 6672. *Denbo v. United States*, 988 F.2d 1029, 1032 (10th Cir. 1993). "A person is responsible within the meaning of the statute if that person is required to collect, truthfully account for or pay over any taxes withhold from the wages of a company's employees." *Id.* A responsible person generally is, but need not be, a managing officer or employee, and there may be more than one responsible person. *Id.; Muck v. United States*, 3 F.3d at 1380-81. "Indicia of responsibility include the holding of corporate office, control

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[4] The First, Fifth, Sixth, Seventh, and Ninth Circuits treat the issue of responsibility under § 6672 as a question of fact and apply the clearly erroneous standard of review. *Caterino v. United States*, 794 F.2d 1, 3 (1st Cir. 1986), *cert. denied*, 480 U.S. 905 (1987); *Raba v. United States*, 977 F.2d 941, 943 (5th Cir. 1992); *Sinder v. United States*, 655 F.2d 729, 731 (6th Cir. 1981); *United States Internal Revenue Serv. v. Charlton*, 2 F.3d 237, 240 (7th Cir. 1993); *Alsheskie v. United States*, 31 F.3d 837, 839 (9th Cir. 1994).

over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees." *Denbo*, 988 F.2d at 1032. "Among other things, therefore, a corporate officer or employee who is responsible if he or she has significant, though not necessarily exclusive, authority in the 'general management and fiscal decisionmaking of the corporation.' " *Id.* (citation omitted).

Bradshaw was the president of HBP during the last quarter of 1985 and the first three quarters of 1986. He was president of Heritage Corporation (the sole shareholder of HBP) and owned 13% of the Heritage Corporation stock. Bradshaw was also on the board of directors of both corporations. He was an authorized signatory on HBP's accounts and had the authority to hire and fire its employees. Based on these facts, we feel that Bradshaw had the necessary indicia of responsibility to satisfy the requirements of § 6672 to be held a "responsible person."

However, our inquiry is complicated by the fact that at the time the taxes became delinquent, Bradshaw lacked the power to disburse funds from HBP's accounts, absent the Bank's approval. Bradshaw argues that because he lacked this power he was not a "responsible person" under the statute. In this connection the district court made detailed findings on the Bank's exertion of financial control of HBP's assets.[5] On the foundation of the findings noted in the margin and others, the district judge

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[5] The trial judge found:

> 9. Between May 10, 1985, and March 14, 1986, Heritage Building Products was in control of all of the company's financial assets, including loan proceeds disbursed by Zions Bank and the operating account.

concluded that Bradshaw had no authority to disburse HBP's funds in order to pay the withholding taxes and

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During this period of time it paid all payroll taxes as they accrued and became due for the second and third quarters of 1985.

10. In late 1985 and early 1986, Heritage Building Products experienced increasing financial difficulties, and on or about January 28, 1986, the company's comptroller informed Zions that the company had not paid its federal withholding taxes for the fourth quarter of 1985, which would be due on January 31, 1986, and that it did not have enough money to pay that obligation. Heritage and Zions began negotiations for a further loan, which negotiations continued until a further extension of funds was obtained on or about April 8, 1986.

11. Pursuant to the Inventory and Accounts Receivable Security Agreement of May 10, 1985, Zions Bank froze all of Heritage Building Products' accounts on March 15, 1986, with no previous Notice to the company. After this, the bank did not allow any fund withdrawals by Heritage from any account including the Heritage operating account, until May 29, 1986. Zions had and maintained full control over disbursal of all monies from the Heritage accounts.

12. On or about April 8, 1985, Heritage Building Products borrowed $150,000 from Zions Bank to meet its withholding tax obligation for the fourth quarter of 1985 and other outstanding debts. The Internal Revenue Service was paid withholding tax and interest of $40,963.37 that was due for the fourth quarter of 1985. A late payment penalty of $2,224.75 had been assessed, but the payment of $40,963.37 was made after discussion with the Internal Revenue Service in which plaintiff understood that the Internal Revenue Service would waive the penalty because taxes and interest were being paid. *A few months later,*

thus was not a "responsible person" under § 6672. We

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the company was notified that the penalty had been reinstated, but Zions Bank then controlled all company funds and refused to pay the penalty or any other withholding taxes.

13. On May 29, 1986, Zions Bank again allowed Heritage Building Products to have limited access to funds in its operating funds. All Heritage deposits were placed into the Zions First National Bank Assignee Account which was under Zions' absolute control, as was the case since May of 1985. However, as to funds transferred from that account to the Heritage Operating Account, the Bank's approval was now required prior to any disbursement from the said operating account and relative to each and every expenditure therefrom. *Accordingly, before the 1986 first quarter federal withholding taxes were due on April 30, 1986, complete financial control of the company's assets had been assumed by Zions Bank.*

14. From on and after March 15, 1986, employees of Heritage Building Products could only write checks on the operating account disbursing company funds after gaining prior authorization from Zions Bank; checks that were not pre-approved by the bank were "bounced," because Zions Bank would not honor those checks.

15. From on and after March 15, 1986, for approximately six months until September 1986, Zions Bank approved payment of net wages to Heritage Building Products' employees, *but would not release funds for payment of taxes withheld for federal and state income taxes.*

16. On August 6, 1986, Heritage and Zions entered into an agreement denominated as "Agreement for Voluntary Liquidation," in which it was contemplated that Heritage would be permitted

must determine whether, in his conclusions, the judge's application of the law to the facts was correct.

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to pay all "lawfully imposed taxes" from the proceeds of the disposition of the Heritage properties. Full credit against existing indebtedness from Heritage to Zions was to be given only after payment of such taxes and assessments. It was specifically contemplated that individual Heritage borrowers including plaintiff would have no personal liability for such taxes.

. . . .

18. Payment of taxes was requested by Heritage Building Products on April 24, 1986, and on each month-end report submitted to Zions Bank thereafter. *Plaintiff five times personally requested that Zions Bank pay or authorize payment of federal withholding taxes owed by Heritage Building Products, and was told by an employee of Zions Bank that the bank would not authorize Heritage to pay taxes from any of the funds in the operating account or from any funds or monies under the control of Zions. Zions consistently refused to release funds to pay such taxes, and the bank always refused to release funds for payment of any tax obligation.*

. . . .

20. After March 15, 1986, no employee of Heritage Building Products, including plaintiff, had any authority or ability to allocate funds and make disbursements for payment of federal and state income taxes withheld from employees' wages, because Zions Bank at all times thereafter controlled all of Heritage's assets.

. . . .

23. Plaintiff advanced an additional $40,000 to Heritage as aforesaid after the freezing of accounts and assets by Zions. These funds were advanced in the contemplation that taxes would be paid from proceeds of operations of the business under an

Bradshaw contends that the power of decision on which creditors to pay was "wrenched" without notice from officers at HBP and thereafter exercised by the Bank. Brief for the Appellee at 10, 22. The government argues that "it is clear that [the Bank's] authority [over HBP's finances] was voluntarily granted by [Bradshaw] as president of HBP when . . . he ceded authority to the Bank to prevent the disbursement of funds from HBP's accounts without the Bank's approval. . . . " Appellant's Opening Brief at 19. The government asserts that this voluntary cession of financial authority cannot absolve Bradshaw of his responsibility under § 6672. *Id.* at 23. We agree.

In *Kalb v. United States*, 505 F.2d 506 (2d Cir. 1974), *cert. denied*, 421 U.S. 979 (1979), the plaintiff company had entered into a financing arrangement similar to the one between HBP and the Bank. Under the arrangement in *Kalb*, the bank continued to finance the company but oversaw the company's financial operations. Like Bradshaw, the appellants in *Kalb* argued that they were not responsible persons because the bank controlled their

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> agreement which was being negotiated and which was later consummated and fully executed on August 6, 1986.
>
> 24. *Plaintiff did not wilfully fail to refuse to make payment of taxes for the last quarter of 1985 or the three quarters of 1986. As to the three quarters of 1986 which are in question plaintiff was not a responsible person because he had no sufficient or actual control over the funds and assets of Heritage.*

I App. at 33-40 (emphasis added). The judge also entered corresponding conclusions of law that Bradshaw was not a "responsible person" under the statute and that he had not willfully failed to pay the withholding taxes.

company's finances. The Second Circuit rejected that argument:

> *Appellants concede that any power the bank may have had to select which creditors should be paid was granted by appellants as part of the consideration for the bank's continuing financing.* . . . Appellants maintained legal control of the company, including the power to sign checks. Appellants were always free to rescind the agreement if it involved them in breaches of their duties under section 3402(a).

Id. at 510 (emphasis added). *Kalb* rests on the premise that a corporate officer may not escape liability as a "responsible person" under § 6672 by voluntarily entering into agreements which permit preferring other creditors to the government. *Id.* at 510. We are persuaded that this reasoning in *Kalb* should apply here.

By giving the Bank the power to exercise financial control of HBP in the event of a default, Bradshaw necessarily gave the Bank the power to decide whether or not to pay a given creditor. In this way Bradshaw effectively granted the Bank the power, in the case of HBP's default, to prefer other creditors over the government. While we agree with the district judge that when the Bank froze HBP's accounts Bradshaw lacked the power to pay the taxes absent the Bank's approval, this lack of power was the direct result of the Agreement which Bradshaw had negotiated and entered into on behalf of HBP. At the time the Agreement was executed in May 1985, it is clear that Bradshaw was responsible person under § 6672. Bradshaw could not cease to be a responsible person simply by ceding to the Bank the right to exert financial

control over HBP. *See Rykoff v. United States*, 40 F.3d 305, 308 (9th Cir. 1994) ("the fact that a bank exercises significant control over payments to creditors does not necessarily absolve the corporate officer of liability under § 6672"); *cf. Gustin v. United States*, 876 F.2d 485, 491-92 (5th Cir. 1989) ("[o]ne does not cease to be a responsible person merely by delegating that responsibility to others"); *Charlton*, 2 F.3d at 240 ("[t]he delegation of disbursal authority does not relieve the delegator of liability").

When the Bank refused Bradshaw's request to pay the taxes, Bradshaw could have resigned his position with HBP or refused to sign any checks and shut down the business. *See Howard*, 711 F.2d at 734 (the fact that a corporate officer might have been fired if he had disobeyed the CEO's orders to not pay withholding taxes did not make him any less responsible for payment of the taxes); *Hochstein*, 900 F.2d at 549 (even though controller of corporation might have been fired for paying withholding taxes, "these adverse consequences simply are no excuse for failing to collect and pay" them); *cf. Raba*, 977 F.2d at 945 (declining to hold that lack of check-signing authority is dispositive of lack of responsibility, noting that to so hold would "open the door to a host of evasive tactics[,] [o]fficers with otherwise unfetterd authority simply would deprive themselves of permission to sign corporate checks in order to avoid the designation of 'responsible person.' "). However, Bradshaw neither resigned nor shut down HBP. Instead he continued the business and signed checks to other creditors. The result was that other creditors were favored over the government. These circumstances were a foreseeable result of

the terms of the Agreement and are therefore directly attributable to Bradshaw's act of entering the Agreement on HBP's behalf.

"To permit corporate officers to escape liability under section 6672 by entering into agreements which prefer other creditors to the government would defeat the entire purpose of the statute." *Kalb*, 505 F.2d at 510. It may seem harsh to require a corporate officer in Bradshaw's position to resign or shut down his business in order to avoid liability under § 6672. However, we believe that although the statute is harsh, "the danger against which it is directed . . . is an acute one against which, perhaps, only harsh measures are availing." *Wright v. United States*, 809 F.2d 425, 428 (7th Cir. 1987).

Bradshaw argues that we should follow *Alsheskie v. United States*, 31 F.3d 837 (9th Cir. 1994), and conclude that he is not a responsible person. In *Alsheskie*, Pro Quality Manufacturing, Inc. defaulted on a financing contract with Commercial Financing Services. Commercial Financing then took possession of Pro Quality's assets and formed Lion Manufacturing, Inc. to continue Pro Quality's operations. *Id.* at 838. Alsheskie became president and chairman of the board of Lion Manufacturing. Alsheskie's duties and powers "included (1) managing the corporation's day-to-day activities, (2) hiring and firing employees, (3) setting employees' wages, (4) signing payroll checks and checks to creditors and (5) preparing accounting records. He also prepared and signed all of Lion Manufacturing's tax returns." *Id.* at 838-39. Despite this authority, the district court there concluded that Alsheskie was not a responsible person.

A divided panel of the Ninth Circuit upheld the district judge's finding. In so holding the majority concluded "[Alsheskie's] authority was limited not by the directions of the owners of Lion Manufacturing . . . but by the financing arrangement. He did not have 'significant control' over what bills to pay or not pay since that control remained, as the district court found, with the parent corporation, Commercial Financing." *Id.* at 839.

In his dissent, Judge Trott stated:

> Not only does the majority's holding run counter to the facts in this case and the law of this and other circuits, it compromises the government's efforts to ensure that taxes are withheld and paid over. Otherwise responsible officers of subsidiary companies can now excuse their failure to pay corporate taxes by claiming the parent company controlled the corporate finances. And responsible parties will continue to argue that their failure to pay over the taxes was not willful because they relied on the assurances of others that the taxes would eventually be paid. The majority has created an unfortunate loophole in what had been a potent weapon against tax fraud.

Id. at 841 (Trott, J., dissenting).

We believe the dissent in *Alsheskie* is the more persuasive view. Moreover the circumstances there differ from those before us.[6]

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[6] Alsheskie's authority stemmed from his position as president and chairman of the board of Lion Manufacturing. The creation of Lion Manufacturing was the result of a financing arrangement between Commercial Financing and Pro Quality.

Bradshaw makes a separate argument dealing with the question of his liability for the late payment penalty on Heritage's 1985 fourth quarter taxes. He says the district judge properly addressed that issue separately in his findings and conclusions (the finding, *inter alia,* that there was an assessment made in November 1987 of $2,493.95 for the period ending December 31, 1985).[7] Bradshaw contends that Heritage paid the full amount of taxes for the last quarter of 1985 and did not pay the assessed penalty

> based on an understanding that the penalty had been abated because Heritage was paying the full amount of taxes and interest. The district court further noted that when Heritage became aware that the penalty had not been abated, no employee of Heritage had the ability to or control of funds required to disburse monies to the IRS in payment of the penalty.

Brief for the Appellee at 11-12.

Although not explicitly stated in the opinion, it appears that Alsheskie did not participate in the creation of the arrangement which gave rise to Lion Manufacturing and his authority. Any lack of control which Alsheskie may have had resulted from an arrangement which he did not create. Here, however, any lack of authority to pay taxes was the result of an agreement Bradshaw made with the Bank.

[7] In note 5, *supra,* Finding 12 states that a late payment penalty of $2,224.75 had been assessed with respect to the fourth quarter of 1985. The difference between the $2,493.95 and $2,224.75 figures is not explained, but they both appear to be related to the late payment penalty on the 1985 fourth quarter tax.

The trial judge's Finding 12 does state that the $40,963.37 payment on 1985 fourth quarter tax was made after discussion with the IRS "in which plaintiff understood that [the IRS] would waive the penalty because taxes and interest were being paid." However we do not read this as finding any binding agreement or waiver of the 1985 late payment penalty assessed. The government, according to the finding, a few months later notified the company that the penalty had been reinstated. The fact that then the Bank controlled the funds and refused to pay the 1985 late payment penalty or any other withholding taxes presents the same question we have already resolved – that entering into an agreement that another institution may control disbursement of the company's funds does not absolve a corporate officer of liability under § 6672.

In sum, the Bank was able to seize control of HBP's finances only because Bradshaw, acting as president of HBP, entered into the Agreement which provided the Bank the opportunity to do so. Bradshaw thus participated in the arrangement which gave rise to the failure to pay HBP's taxes. We are convinced it was error to hold that Bradshaw was not a "responsible person" under § 6672 in these circumstances.

B. Willfulness

1. Standard of Review

As with the previous issue, the government asserts that the determination of willfulness under § 6672 is a question of law subject to *de novo* review, while Bradshaw argues that it is a question of fact on which the district

judge's ruling can not be overturned unless it is clearly erroneous.

Some circuits have held that the ultimate issue of willfulness is subject to *de novo* review *United States v. McCombs*, 30 F.3d at 320 (noting, however, that this is a difficult question that, in similar contexts, has divided the courts for over a century); *Thibodeau v. United States*, 828 F.2d at 1505-07. Our prior decisions have, however, treated this as an issue of fact. *See Taylor*, slip op. at 12-13 (holding that the district court, sitting in review of the decision of the bankruptcy court, erred in concluding that plaintiff's failure to pay over taxes was willful because the bankruptcy court had made no findings on willfulness; we remanded for bankruptcy court findings); *Denbo*, 988 F.2d at 1033 (reviewing jury finding of willfulness without suggesting that the issue is other than one of fact); *United States v. Burden*, 486 F.2d 302, 304 (10th Cir. 1973) (applying the clearly erroneous standard), *cert. denied*, 416 U.S. 904 (1974).

We are, of course, bound to follow such prior decisions of this court. Here, however, we conclude that the district court's finding of no willfulness by Bradshaw must be reversed regardless of whether the clearly erroneous standard or the *de novo* standard of review is applied.

2. Did Bradshaw "Willfully" Fail to Pay Over the 1986 Withholding Taxes and the 1985 Late Payment Penalty?

Only if Bradshaw "willfully" failed to collect or truthfully account for and pay over the 1986 taxes and the

1985 late payment penalty could he be liable under § 6672. Willfulness under § 6672 "means a voluntary, conscious and intentional decision to prefer other creditors over the Government." *Denbo*, 988 F.2d at 1033. "Willfulness is present whenever a responsible person acts or fails to act consciously and voluntarily and with knowledge or intent that as a result of his action or inaction trust funds belonging to the government will not be paid over but will be used for other purposes." *Wright*, 809 F.2d at 428 (internal quotation marks and citation omitted). In *Denbo* we said:

> Although negligence does not give rise to section 6672 liability, " 'the willfulness requirement is . . . met if the responsible officer shows a "reckless disregard of a known or obvious risk that trust funds may not be remitted to the government. . . . " ' " *Smith v. United States*, 894 F.2d 1549, 1554 n.5 (11th Cir. 1990) (quoting *Thibodeau*, 828 F.2d at 1505). A responsible person's failure to investigate or to correct mismanagement after being notified that withholding taxes have not been paid satisfies the section 6672 willfulness requirement. [Citation omitted].

988 F.2d at 1033.

Such is the case here. The district court found that Bradshaw repeatedly requested the Bank to pay the taxes. Findings at 6. It is clear that Bradshaw knew the taxes were unpaid. Moreover, Bradshaw's testimony at trial indicates that at the time the Agreement was negotiated and executed he was concerned with the payment of payroll taxes. And, as noted, Bradshaw's decision to enter the Agreement raised the specter that other creditors would be favored over the government. As in *Kalb*,

Bradshaw "not only knew of but negotiated the arrangement with the bank under which other creditors were preferred to the government. He participated in the arrangement by signing checks while knowing that withholding taxes were not being paid." *Kalb*, 505 F.2d at 511.[8] Entering the Agreement was a knowing and intentional step which created the possibility that other creditors would be favored over the government.

When the Bank refused to approve checks for the taxes, Bradshaw could have resigned or refused to sign any checks and shut down, HBP. His decision to stay on, continue the business, and pay other creditors after the Bank's refusal to approve payment of the taxes, when considered in light of the Agreement, leads to the conclusion that his failure to pay the 1986 withholding taxes and the 1985 late payment penalty was willful. The district court's finding to the contrary was clearly in error.

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[8] We are mindful that as to one appellant, Herold, the Second Circuit remanded the issue of willfulness for trial. The court held, however, that there was no substantial question that appellant Kalb's failure to pay the tax was willful: he not only knew of but negotiated the arrangement with the bank under which other creditors were preferred to the government and he signed checks while knowing withholding taxes were not being paid. *Id.* at 511. There was, however, a triable issue of willfulness as to appellant Herold: the government did not deny his claim that he did not know withholding taxes were not being paid; he was only purchasing agent for the company, with little understanding of financial matters and payment of taxes was made by others. *Id.* at 511. Obviously, Bradshaw's position here is like Kalb's, not Herold's, with the first basic distinction being that Bradshaw clearly knew the withholding taxes of HBP were not being paid.

III.

Accordingly, we REVERSE the judgment of the district court with respect to plaintiff Bradshaw's liability under 36 U.S.C. § 6672 of $27,764.54, found traceable to the tax assessment by the district judge as reflected in his December 23, 1993, order noted. The judgment in plaintiff's favor as to the remaining $6,814 awarded him because of his overpayment of tax is not disturbed. We REMAND the case with directions to enter judgment for the United States in accordance with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION

J. (JAY) LARRY BRADSHAW,

Plaintiff, FINDINGS OF FACT AND CONCLUSIONS OF LAW

vs.

UNITED STATES OF AMERICA, Civil No. 92-C-0428G

Defendant. (Filed Sep. 7, 1993)

This matter came for non-jury trial on June 4, 1993, before United States District Judge J. Thomas Greene, with J. Jay Bullock representing the plaintiff and Kirk C. Lusty and Joel J. Roessner, Trial Attorneys, Tax Division, U.S. Department of Justice, representing the United States. Having heard the evidence and reviewed the exhibits offered at trial, the Court makes and enters the following:

FINDINGS OF FACT

1. The court has jurisdiction of this action under 28 U.S.C. §§ 1340 and 1346 and 26 U.S.C. § 7402.

2. On November 9, 1987, and on March 21, 1988, a delegate of the Secretary of the Treasury made assessments under 26 U.S.C. § 6672 against J. Larry Bradshaw in amounts totalling $75,601.01 for the unpaid withholding tax liabilities of Heritage Building Products for the

quarters ending December 31, 1985, March 31, 1986, June 30, 1986, and September 30, 1986. The assessments were made as follows:

Tax Period Ending	Amount	Assessment Date
12/31/85	$ 2,493.95	11/9/87
3/31/86	$23,862.81	3/21/88
6/30/86	$32,635.96	11/9/87
9/30/86	$16,608.29	11/9/87

3. During those quarters, plaintiff was president of Heritage Building Products. He was not a stockholder of Heritage Building Products during those quarters, but he did own 13.4% of the stock of Heritage Corporation, which owned all of the stock of Heritage Building Products. Heritage Corporation Profit Sharing Plan and members of Mr. Bradshaw's family owned the remaining stock of Heritage Corporation.

4. Plaintiff paid $438.60 pursuant to the assessment under Internal Revenue Code Section 6672.

5. Plaintiff on January 31, 1992, filed with the IRS a claim for the refund of the $438.60 paid pursuant to the assessment under Internal Revenue Code Section 6672.

6. Defendant on February 25, 1992, denied the plaintiff's claim for the refund of the $438.60 paid pursuant to the assessment under Internal Revenue Code Section 6672.

7. Prior to May 10, 1985, Heritage Corporation and its subsidiaries had a financing arrangement with Zions First National Bank under which a credit line for operating capital was provided in which the principal security

was a trust deed on real properties with no direct supervision or control over the accounts receivable of Heritage. Proceeds of loans from Zions to Heritage were deposited into and disbursed from an operating account. The arrangement was maintained in the early 1980s until Heritage began experiencing financial difficulties in 1984 or early 1985.

8. On May 10, 1985, Heritage Building Products obtained a revolving line of credit from Zions Bank in the amount of $650,000 pursuant to a written Credit Agreement and an Inventory and Accounts Receivable Security Agreement. The Inventory and Accounts Receivable Security Agreement granted Zions Bank liens on all of Heritage Building Products' assets and the legal right to freeze any bank account of Heritage Building Products and Heritage Corporation in the event of default. All deposits were made into a control account designated as "Zions First National Bank Assignee for Heritage Corporation." Heritage had no control over withdrawals from this account, but upon approval by Zions specific amounts would be transferred to the Heritage Corporation operating account. Heritage Corporation had control over the operating account in that it could disburse moneys from that account without supervision or control by Zions. This arrangement continued until March 14, 1986.

9. Between May 10 1985, and March 14, 1986, Heritage Building Products was in control of all of the company's financial assets, including loan proceeds disbursed by Zions Bank and the operating account. During this period of time it paid all payroll taxes as they

accrued and became due for the second and third quarters of 1985.

10. In late 1985 and early 1986, Heritage Building Products experienced increasing financial difficulties, and on or about January 28, 1986, the company's comptroller informed Zions that the company had not paid its federal withholding taxes for the fourth quarter of 1985, which would be due on January 31, 1986, and that it did not have enough money to pay that obligation. Heritage and Zions began negotiations for a further loan, which negotiations continued until a further extension of funds was obtained on or about April 8, 1986.

11. Pursuant to the Inventory and Accounts Receivable Security Agreement of May 10, 1985, Zions Bank froze all of Heritage Building Products' accounts on March 15, 1986, with no previous Notice to the company. After this, the bank did not allow any fund withdrawals by Heritage from any account including the Heritage operating account, until May 29, 1986. Zions had and maintained full control over disbursal of all monies from the Heritage accounts.

12. On or about April 8, 1985, Heritage Building Products borrowed $150,000 from Zions Bank to meet its withholding tax obligation for the fourth quarter of 1985 and other outstanding debts. The Internal Revenue Service was paid withholding tax and interest of $40,963.37 that was due for the fourth quarter of 1985. A late payment penalty of $2,224.75 had been assessed, but the payment of $40,963.37 was made after discussion with the Internal Revenue Service in which plaintiff understood

that the Internal Revenue Service would waive the penalty because taxes and interest were being paid. A few months later, the company was notified that the penalty had been reinstated, but Zions Bank then controlled all company funds and refused to pay the penalty or any other withholding taxes.

13. On May 29, 1986, Zions Bank again allowed Heritage Building Products to have limited access to funds in its operating funds. All Heritage deposits were placed into the Zions First National Bank Assignee Account which was under Zions' absolute control, as was the case since May of 1985. However, as to funds transferred from that account to the Heritage Operating Account, the Bank's approval was now required prior to any disbursement from the said operating account and relative to each and every expenditure therefrom. Accordingly, before the 1986 first quarter federal withholding taxes were due on April 30, 1986, complete financial control of the company's assets had been assumed by Zions Bank.

14. From on and after March 15, 1986, employees of Heritage Building Products could only write checks on the operating account disbursing company funds after gaining prior authorization from Zions Bank; checks that were not pre-approved by the bank were "bounced," because Zions Bank would not honor those checks.

15. From on and after March 15, 1986, for approximately six months until September 1986, Zions Bank approved payment of net wages to Heritage Building Products' employees, but would not release funds for

payment of taxes withheld for federal and state income taxes.

16. On August 6, 1986, Heritage and Zions entered into an agreement denominated as "Agreement for Voluntary Liquidation," in which it was contemplated that Heritage would be permitted to pay all "lawfully imposed taxes" from the proceeds of the disposition of the Heritage properties. Full credit against existing indebtedness from Heritage to Zions was to be given only after payment of such taxes and assessments. It was specifically contemplated that individual Heritage borrowers including plaintiff would have no personal liability for such taxes.

17. Heritage Building Products ceased its business operations in September of 1986, after having been under the complete financial control of Zions Bank, its primary creditor and lender, for approximately six months.

18. Payment of taxes was requested by Heritage Building Products on April 24, 1986, and on each month-end report submitted to Zions Bank thereafter. Plaintiff five times personally requested that Zions Bank pay or authorize payment of federal withholding taxes owed by Heritage Building Products, and was told by an employee of Zions Bank that the bank would not authorize Heritage to pay taxes from any of the funds in the operating account or from any funds or monies under the control of Zions. Zions consistently refused to release funds to pay such taxes, and the bank always refused to release funds for payment of any tax obligation.

19. Heritage Building Products could not pay withholding taxes due on employee wages for the first, second, and third quarters of 1986 because its assets were completely controlled by Zions Bank, which would not release funds for payment of such taxes.

20. After March 15, 1986, no employee of Heritage Building Products, including plaintiff, had any authority or ability to allocate funds and make disbursements for payment of federal and state income taxes withheld from employees' wages, because Zions Bank at all times thereafter controlled all of Heritage's assets.

21. On several occasions plaintiff loaned money to Heritage on promissory notes to meet obligations for business expenses and materials on which no re-payments were made:

PROMISSORY NOTES

Date	Amount	Purpose
January 28, 1986	$15,000.00	Payroll
March 3, 1986	$25,000.00	Interest to Zions Bank
April 4, 1986	$25,000.00	Interest to Zions Bank
June 10, 1986	$15,000.00	Miscellaneous Suppliers

22. Plaintiff advanced $40,000 to Heritage as aforesaid prior to March 15, 1986, at which time Zions froze the Heritage accounts and assumed total control of those accounts and all other assets of Heritage.

23. Plaintiff advanced an additional $40,000 to Heritage as aforesaid after the freezing of accounts and assets

by Zions. These funds were advanced in the contemplation that taxes would be paid from proceeds of operations of the business under an agreement which was being negotiated and which was later consummated and fully executed on August 6, 1986.

24. Plaintiff did not wilfully fail to refuse to make payment of taxes for the last quarter of 1985 or the three quarters of 1986. As to the three quarters of 1986 which are in question plaintiff was not a responsible person because he had no sufficient or actual control over the funds and assets of Heritage.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1340 and 1346, and 26 U.S.C. § 7402.

2. Heritage Building Products did meet its obligation to pay withholding taxes in the amount of $40,963.37, to the United States for the last quarter of 1985, which taxes were paid from the proceeds of a loan from Zions Bank under an understanding that a penalty in the amount of $2,493.95 would have be [sic] waived because the taxes and interest were being paid. The penalty was later purportedly reinstated, but at a time when no employee of Heritage Building Products including plaintiff had any ability to release company funds for payment of the penalty.

3. J. Larry Bradshaw was not a person within the meaning of 26 U.S.C. § 6672 who was responsible for collecting, accounting for and paying to the United States the taxes withheld from employees of Heritage Building

Products during the first, second, and third quarters of 1986, because he had no power to disburse any of Heritage's funds without prior approval after March 14, 1986, in that on and after March 15, 1986, Zions Bank had taken over complete control of the company's accounts and assets, and refused to authorize disbursement of Heritage Building Products' funds to pay the withholding taxes due to the United States for the first three quarters of 1986.

4. Plaintiff did not wilfully fail or refuse to pay any of the taxes assessed and due from Heritage for the last quarter of 1985 or the first three quarters of 1986.

5. Plaintiff is entitled to judgment against the United States on his complaint in the amount of $438.60, the counterclaim by the United States is dismissed, and the United States is directed to release the tax lien it has filed against the residence of plaintiff's wife.

DATED: September 3rd, 1993.

/s/ J. Thomas Greene
J. THOMAS GREENE
UNITED STATES
DISTRICT JUDGE

APPENDIX C

J. JAY BULLOCK (0484)
Attorney for Plaintiff
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Salt Lake City, Utah 84111
Telephone: 521-6660

IN THE UNITED STATES JUDICIAL DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

J. (JAY) LARRY BRADSHAW, Plaintiff and Counterclaim Defendant, v. **UNITED STATES OF AMERICA,** Defendant and Counterclaim Plaintiff.	**JUDGMENT** Civil No. 92-C-0428G

This matter came before United States District Judge J. Thomas Greene for non-jury trial on June 4, 1993, and Findings of Fact and Conclusions of Law were entered on September 7, 1993, which determined that Plaintiff is entitled to judgment on his Complaint against the United States. Based upon those Findings of Fact and Conclusions of Law, judgment is entered as follows:

Judgment is entered against the United State [sic] of America in the sum of the following:

1. $35,978.00 and

2. All amounts which may be paid to the Internal Revenue Service or the United States of America by the Plaintiff after September 17, 1993, in connection with an assessment by the Internal Revenue Service against the Plaintiff of a penalties (the "Assessments") under Section 6672(a) of the Internal Revenue Code of 1986, for nonpayment of Federal employment taxes by Heritage Building Products for the 4th quarter of 1985, the 1st quarter of 1986, the 2nd quarter of 1986 and the 3rd quarter of 1986, including but not limited to the following:

2.1 In connection with an installment payment agreement entered into between the Plaintiff and the Internal Revenue Service in connection with the Assessments requiring the payment by the Plaintiff to the Internal Revenue Service of $200.00 per month which have been applied to the Assessments.

2.2 Such Federal income tax refunds to which the Plaintiff may be entitled and which may be taken or withheld by the Internal Revenue Service and applied to the Assessments any other amounts which may be paid to the Internal Revenue Service and applied to the Assessments, and

3. Statutory additions with respect to the Assessments, and

4. Interest from the date of payment with respect to the Assessments.

Plaintiff is directed to release the Federal tax lien the Internal Revenue Service has filed against the personal residence owned by the wife of the Plaintiff.

DATED this 20th day of October, 1993.

BY THE COURT:

/s/ J. Thomas Greene
J. Thomas Greene
United States District Court Judge

THIS SIGNATURE PAGE IS PART OF A DOCUMENT ENTITLED "JUDGMENT" AND HAS NOT BEEN SIGNED BY THE FOLLOWING PERSON(S) FOR ANY OTHER PURPOSE.

APPROVED AS TO FORM:

/s/ J. Jay Bullock
J. Jay Bullock
Attorney for Plaintiff

_____
Kirk C. Lusty
Attorney for Defendant

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION

J. (JAY) LARRY BRADSHAW,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER

Civil No.
92-C-0428G

(Filed Dec. 23, 1993)

This matter is before the court on the United States motion to amend the judgment. The matter has been fully briefed and oral argument was not requested. Now, being fully advised, the court renders its Order.

This matter came for non-jury trial on June 4, 1993, with J. Jay Bullock representing the plaintiff and Kirk C. Lusty and Joel J. Roessner, Trial Attorneys, Tax Division, U.S. Department of Justice, representing the United States. The court entered its findings of fact and conclusions of law in favor of plaintiff. Pursuant to the court's directive, counsel for plaintiff submitted a form of judgment which the court executed on October 20, 1993, granting to plaintiff, inter alia, judgment in the amount of $35,978. The United States did not file a timely objection to plaintiff's form of judgment.

On November 2, 1993, the United States filed a motion to enlarge the time to object; and objection to the proposed form of judgment; or in the alternative a motion

to amend the judgment. The United States acknowledges that its motion to enlarge and its objection to the form of judgment are moot in view of the fact that the court executed the judgment, but urges the court to consider its motion to amend the judgment on the basis that the amount of the judgment is substantially more that [sic] the amount of the refund awarded to plaintiff.

Judgment was entered in the amount of $35,978. The court's Findings of Fact and Conclusions of Law established that plaintiff was entitled to judgment in the amount of $438.60. The United States argues that the judgment, as executed, constitutes a mistake. However, the United States does not object to awarding plaintiff the full amount of penalties paid, even if the full amount was not reflected in the $438.60 refund granted by the court. The United States argues that the penalties paid by plaintiff total $27,764.54, and that judgment should be entered for that amount.

Plaintiff argues that in addition to the undisputed $27,764.54 in penalties that the United States has withheld, he is entitled to $6,814 which plaintiff overpaid in 1991. The parties agree that plaintiff overpaid his 1991 taxes in the amount of $6,814. However, the United States asserts that because that amount was not included in plaintiff's tax liabilities at issue in this litigation, he should not be able to recover it through this litigation, but must file a separate refund proceeding.

An additional $1,399.45 is disputed. Counsel for plaintiff admits that such amount is the result of a calculation error.

It is undisputed that plaintiff's tax liabilities directly traceable to the tax assessment held unlawful by the court is $27,764.54. It is also undisputed that plaintiff overpaid and is entitled to an additional $6,814. Accordingly, the court deems the total judgment to which plaintiff is entitled to be $34,578.54.

For the reasons stated above, it is

HEREBY ORDERED, that defendant's motion to amend the judgment is DENIED, except to the extent that the amount of the judgment is changed to reflect the facts set forth herein; it is

FURTHER ORDERED, that judgment be entered in favor of plaintiff in the amount of $34,578.54. The court contemporaneously herewith has executed a Judgment in favor of plaintiff reflecting the proper amount due plaintiff.

DATED: December 23, 1993.

/s/ J. Thomas Greene
J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION

J. (JAY) LARRY BRADSHAW,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

(Filed Dec. 23, 1993)

Civil No.
92-C-0428G

This matter is before the court on the United States motion to amend the judgment. A non-jury trial was held on June 4, 1993, with J. Jay Bullock representing the plaintiff and Kirk C. Lusty and Joel J. Roessner, Trial Attorneys, Tax Division, U.S. Department of Justice, representing the United States. The court entered its findings of fact and conclusions of law in favor of plaintiff. Pursuant to the court's directive, counsel for plaintiff submitted a form of judgment. The United States did not timely object, but filed a motion to amend the judgment. The matter has been fully briefed and oral argument was not requested. Now, being fully advised.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

The judgment executed by the court on October 20, 1993, is hereby amended to substitute $34,578.54 as the amount of the Judgment; it is

FURTHER ORDERED, that the terms and conditions of the prior Judgment shall remain in force and effect.

DATED: December 23, 1993.

/s/ J. Thomas Greene
J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

APPENDIX E

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

J. LARRY BRADSHAW, Plaintiff-Counterclaim Defendant-Appellee	)	No. 94-4018 No. 94-4064
v.	)	
UNITED STATES OF AMERICA, Defendant-Counterclaimant-Appellant.	)	(Filed Apr. 18, 1996

ORDER ON REHEARING

Before **TACHA** and **HOLLOWAY,** Circuit Judges, and **ELLISON,*** District Judge.

On consideration of the petition for rehearing and the response, the court finds and concludes as follows:

In his petition Bradshaw asserts that "[t]he Court should have relied upon the 1986 Liquidation Agreement inasmuch as it is this agreement which controlled and dictated the relationship between Heritage and Zions

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* The Honorable James O. Ellison, Senior United States District Judge for the Northern District of Oklahoma, sitting by designation.

Bank, during the period in which withheld employee taxes for the first, second and third quarters of 1986 were due and payable." Petition for Rehearing at 15. He argues that this 1986 Liquidation Agreement superseded the May 1985 Agreements and that under this "controlling" Liquidation Agreement he is not a responsible person.

Fourth Quarter 1985 Penalty and First and Second Quarter 1986 Taxes

Because the Liquidation Agreement was not executed until August 6, 1986, Bradshaw cannot rely on it as to any taxes or penalties accruing prior to that date. Therefore the Liquidation Agreement is irrelevant to Bradshaw's failure to pay the fourth quarter 1985 penalty and first and second quarter 1986 taxes. Rather the May 1985 agreement was the operative agreement in place when those obligations accrued. However, as we explained in our opinion, Bradshaw cannot use the May 1985 agreement to excuse his failure to pay the taxes.[1]

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[1] Even assuming that Bradshaw's assertion that the Bank's control over HBP's finances was not authorized is correct, that still would not demonstrate that Bradshaw was not a "responsible person." If the Bank was breaching its obligations to Bradshaw, Bradshaw should have refused to sign any checks for creditors other than the government. He should have demanded that the Bank authorize the payment of taxes and if the Bank refused, he could have resigned and ceased doing business. Thus, Bradshaw's assertion that the Bank "independently instituted" a change in the banking operations, Petition at 4, is beside the point. Even if the Bank lacked authority to do what it did, that does not excuse Bradshaw's continuing his business and paying other creditors in the face of unpaid tax obligations.

Third Quarter 1986 Taxes

As for the third quarter 1986 taxes, even assuming Bradshaw can rely on the August 6, 1986 Liquidation Agreement, he was still a responsible person under § 6672.

Bradshaw asserts that "Heritage could not remit withholding taxes due on employee wages for the first, second, and third quarters of 1986 because Heritage assets were completely controlled by Zions Bank, and Zions Bank would not release funds for payment of such taxes *despite Zions Bank's obligation to do so under the 1986 Liquidation Agreement* and Bradshaw's repeated requests." Petition at 11 (emphasis added). The relevant paragraphs of the Liquidation Agreement provide as follows (the term "Borrowers" refers to Bradshaw, the various Heritage entities, and R. Lamar Bradshaw; "Zions" refers to the Bank).[2] Bradshaw asserts that the deletion of the last

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[2] The Liquidation Agreement provided in part:

> 12. Except as expressly provided in this paragraph 12, the Borrowers each represent that, after diligent inquiry, to the best of their knowledge and belief, they have fully complied and will continue to fully comply with all applicable laws, statutes, rules, regulations, orders, and restrictions of any domestic or foreign governmental authority having jurisdiction over any of the Borrowers, their businesses, or their properties. *To the best of the Borrowers' current knowledge, the Borrowers currently owe state and federal taxes which are due and unpaid,* and which are fully disclosed on financial statements furnished to Zions and on Exhibits to this Agreement.
>
> 20. *Surrender of Personal Property.* Contemporaneous with the execution of this Agreement, and

sentence of ¶ 12 (which had said "The individual Borrowers may have personal liability for such taxes") "clearly illustrates the intent to remove the personal liability for the taxes from the individual borrowers and **require** payment of the taxes through the provisions

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> continuing thereafter, the Borrowers shall surrender possession to Zions of all personal property described in the Inventory and Accounts Receivable Security Agreement, as amended, the Business Security Agreement and the Trust Deeds identified in paragraph 2 above, and shall fully cooperate and assist Zions in disposing of such personal property in accordance with all of Zions' existing legal and equitable rights and remedies. The Borrowers shall receive full credit against the loans described in subparagraphs 1(a), 1(b) and 1(c) above for any proceeds of such disposition received by Zions, after payment of any costs and expense of such disposition, including reasonable attorney's fees and legal expenses incurred by Zions and compensation to J. Larry Bradshaw in accordance with paragraph 23 below, and after payment of $5,000 to counsel for the Borrowers in accordance with paragraph 27 below, *and after the payment of any taxes and assessments under paragraph 30 below.*
>
> 30. *Taxes and Assessments.* Except on that real property transferred in fee to Zions, as set forth in paragraph 19 above, *the Borrowers covenant that the Borrowers shall pay, when due, from the proceeds of disposition of property as described in paragraph 20 above, all lawfully imposed taxes on the property described in paragraphs 2 and 3 above and all other lawfully imposed taxes,* except and so long as the Borrowers lawfully contest such taxes in good faith and set aside adequate reserves therefore.

Appellee's Supplemental Appendix at 80, 84-85, 92 (emphasis added).

stated in paragraphs 20 and 30." Petition for Rehearing at 7 (emphasis in original). He concludes "under the controlling 1986 Liquidation Agreement, Heritage was to have access to liquidation proceeds in order to remit the withheld employee taxes. *The power of Zions Bank to refuse to honor checks made payable to the Internal Revenue Service was not a power ceded to Zions Bank by Bradshaw or any one else on the part of Heritage, through this or any other agreement.*" Petition for Rehearing at 7-8 (emphasis in original). We disagree.

As noted in our opinion, the power to refuse to honor checks made payable to the IRS was ceded to the Bank by Bradshaw through the May 1985 agreement. *See* slip op. at 12. Moreover, Bradshaw misinterprets the Liquidation Agreement. He reads ¶¶ 12, 20 and 30 to mean that "the first obligation to be satisfied from the assets of Heritage was the remittance of any tax obligations of Heritage." Petition for Rehearing at 7. However, nowhere in these or any other provisions of the Liquidation Agreement does the Bank agree to honor checks to pay the taxes.[3] In light of Bradshaw's knowledge that the taxes were not being paid and that the Bank had refused his previous requests to approve checks to the IRS, Bradshaw could have insisted on such a provision. He did not. Thus, there is nothing in the Liquidation Agreement which absolves Bradshaw of his obligation to see that the taxes were

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[3] Paragraph 12 merely acknowledged that the Borrowers owed state and federal taxes. Paragraph 20 described the method for determining how the Borrowers would receive credit against their loans for the proceeds of the disposition of assets. In ¶ 30, the *Borrowers* agree to pay lawfully imposed taxes from the disposition of property.

paid. Therefore, for the third quarter 1986 taxes Bradshaw was a "responsible person."

Willfulness

Bradshaw states that he "insisted on the inclusion in the 1986 Liquidation Agreement of provisions for the payment of taxes, with the full knowledge that like provisions were not provided in the May 1985 Agreements" and that he "operated under the belief that as negotiated and agreed to, those taxes would be paid as funds became available through Zions Bank's liquidation of Heritage assets." Petition for Rehearing at 13. Therefore, he argues, he "did not at any point make a voluntary, conscious and intentional decision to not effect payment of the withheld taxes to the United States." *Id.* We disagree.

For the fourth quarter 1985 penalty and the first and second quarter 1986 taxes, Bradshaw's voluntary agreement to cede power over the accounts to the Bank in the even of default, coupled with his knowledge that other creditors were being paid when the IRS was not, is sufficient to make his failure to pay the taxes willful. As for the third quarter 1986 taxes, there is nothing in the Liquidation Agreement which requires the Bank to pay the taxes from the liquidation proceeds. Instead, it was Bradshaw and the other Borrowers, who agreed to pay the taxes out of the proceeds. Liquidation Agreement ¶ 30, Appellee's Supplemental Appendix at 92. There is nothing in the Liquidation Agreement that alters the Bank's power to refuse to honor checks to the IRS. Bradshaw could have insisted on such a provision, but

did not. His failure to do so in the face of his knowledge of the unpaid tax obligations satisfies us that he voluntarily and consciously failed to pay the third quarter taxes, and therefore his failure to pay was willful.

Finally, as noted in our opinion, Bradshaw could have resigned and shut down the business when the Bank refused to approve the payment of the taxes. Instead he voluntarily continued to conduct business, and later carried out the liquidation of the business, with full knowledge of the unpaid taxes. We are convinced that his failure to pay the taxes was willful.

Accordingly, the petition for rehearing is DENIED.

(2)

Supreme Court, U.S.
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No. 96-102

In the Supreme Court of the United States

OCTOBER TERM, 1995

J. LARRY BRADSHAW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the president of a corporation who is responsible for ensuring that taxes withheld from employee wages are paid over to the government may delegate that responsibility to a creditor of the corporation and thereby absolve himself of liability under 26 U.S.C. 6672 for the withheld taxes that were not paid to the government.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 83 F.3d 1175. The opinion of the district court (Pet. App. B1-B9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1995. The order denying the petition for rehearing was entered on April 18, 1996 (Pet. App. E1-E7). The petition for a writ of certiorari was filed on July 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the last quarter of 1985 and the first, second, and third quarters of 1986, petitioner was a

shareholder, director and the president of the Heritage Corporation. He also was a director and the president of its wholly-owned subsidiary, Heritage Building Products (HBP) (Pet. App. A2-A3, B2). On May 10, 1985, petitioner established a line of credit in the amount of $650,000 for HBP with Zions First National Bank. Under the credit agreement, the Bank obtained liens on all of HBP's assets (including accounts receivable) and also obtained the contractual right to freeze the accounts maintained by HBP with the Bank in the event of default. Any funds received by HBP after an event of default were to be deposited into a "control account" and could not be used by HBP without the approval of the Bank (Pet. App. A3, B3).

Approximately one year later, the Bank declared HBP to be in default and elected to exercise its rights under the credit agreement. Beginning on May 29, 1986, HBP was permitted to disburse funds from its accounts only with the prior approval of the Bank. The Bank approved some payments for wages (net of taxes) to petitioner and other employees, to various suppliers and for insurance premiums. The Bank refused, however, to approve payment of the federal and state taxes that had been withheld from employee wages despite petitioner's request that those payments be authorized. In his capacity as president of HBP, petitioner signed the checks that the Bank approved for payment.[1*]

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[1] Petitioner loaned $40,000 to HBP in early 1986. Those funds were used to pay wages owed to employees and interest owed to the Bank. After the Bank seized the company's accounts, petitioner loaned an additional $40,000 to HBP. Those funds were used to pay debts owed to various suppliers and interest owed to the Bank (Pet. App. A4, B7).

In August 1986, HBP entered into an agreement with the Bank under which the company ceased business operations and was voluntarily liquidated. Petitioner signed that agreement on behalf of HBP (Pet. App. A3-A4, B4-B6).

2. HBP failed to pay the government the federal taxes that had been withheld from employee wages for a portion of the fourth quarter of 1985 and for the entire first, second, and third quarters of 1986 (Pet. App. A4, B4-B5, B7). Pursuant to 26 U.S.C. 6672, the Internal Revenue Service made an assessment against petitioner in the amount of the unpaid taxes ($75,601), as a person who was "responsible" for collecting and paying over the withheld taxes who "willfully" failed to do so (Pet. App. A4, B1-B2). Petitioner made a partial payment of that assessment and brought this refund suit in district court. The government counterclaimed for the unpaid balance of the assessment (Pet. App. A4, B2).

After a bench trial, the district court entered judgment in favor of petitioner. The court concluded that petitioner was not "responsible" for paying over the withheld taxes, within the meaning of Section 6672, because he "had no power to disburse any of Heritage's funds without prior approval" by the Bank (Pet. App. B9). The court further concluded that, because the Bank had "complete control of the company's accounts and assets," petitioner had not "willfully" failed to pay over the withheld taxes, as Section 6672 requires (Pet. App. B9).

3. a. The court of appeals reversed (Pet. App. A1-A22). The court held that "a corporate officer may not escape liability as a 'responsible person' under § 6672 by voluntarily entering into agreements which permit preferring other creditors to the government"

(Pet. App. A13). The court concluded that petitioner remained "responsible" for paying over the taxes to the government because his ostensible lack of power to pay the taxes "was the direct result of the Agreement which [petitioner] had negotiated and entered into on behalf of HBP" (*ibid.*). The court explained that "the Bank was able to seize control of HBP's finances only because [petitioner], acting as president of HBP, entered into the Agreement which provided the Bank the opportunity to do so" (*id.* at A18). Because petitioner, acting as president of the corporation, "participated in the arrangement which gave rise to the failure to pay HBP's taxes," he remained "responsible" for those taxes under Section 6672 (Pet. App. A18).

The court further concluded that petitioner had acted "willfully" in failing to ensure payment of the withheld taxes, as Section 6672 further requires (Pet. App. A18-A22). As the court explained (*id.* at E6):

> [Petitioner's] voluntary agreement to cede power over the accounts to the Bank in the even[t] of default, coupled with his knowledge that other creditors were being paid when the IRS was not, is sufficient to make his failure to pay the taxes willful.

b. In reaching these conclusions, the court of appeals stated that it was applying a "*de novo*" standard of review to the determination whether petitioner was "responsible" for accounting for and paying the withheld taxes to the government (Pet. App. A6). The court observed that "the ultimate determination whether an individual is a 'responsible person' within the meaning of 26 U.S.C. §6672 in-

volves an application of law to fact which is subject to *de novo* review on appeal" (Pet. App. A7).

The court further stated that whether petitioner had acted "willfully" (within the meaning of Section 6672) in failing to pay over the withheld taxes is "an issue of fact" for which existing circuit precedent requires a "clearly erroneous" standard of review (Pet. App. A19). The court concluded, however, that the appropriate standard for review of a determination of willfulness under Section 6672 is unimportant in this case because "we conclude that the district court's finding of no willfulness by [petitioner] must be reversed regardless of whether the clearly erroneous or the *de novo* standard of review is applied" (Pet. App. A19).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. Under Section 6672(a) of the Internal Revenue Code, a person who is "responsible" for collecting, accounting for and paying over withholding taxes to the government, and who "willfully" fails to do so, is liable for a "penalty" in the amount of the unpaid taxes. 26 U.S.C. 6672(a). The case law has established that an individual is "responsible" under Section 6672 if he has the status, duty, and authority to avoid a default in the collection or payment of the trust fund taxes. *E.g.*, *Thomsen* v. *United States*, 887 F.2d 12, 16 (1st Cir. 1989); *Kinnie* v. *United States*, 994 F.2d 279, 284 (6th Cir. 1993); *Davis* v. *United States*, 961 F.2d 867, 873 (9th Cir. 1992), cert. denied, 506 U.S. 1050 (1993). An officer is "responsible" with-

in the meaning of the statute if he is vested with significant authority over the financial decisions of the corporation (Pet. App. A7-A8):

> [i]ndicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees.

Accord, *e.g.*, *Thomsen* v. *United States*, 887 F.2d 12, 16 (1st Cir. 1989); *Kinnie* v. *United States*, 994 F.2d at 283; *Denbo* v. *United States*, 988 F.2d 1029, 1032 (10th Cir. 1993); *George* v. *United States*, 819 F.2d 1008, 1011-1012 (11th Cir. 1987).

A person who is "responsible" for paying over withheld taxes acts "willfully" in failing to do so if he participates in a "voluntary, conscious, and intentional decision to prefer other creditors over the Government." *Denbo* v. *United States*, 988 F.2d at 1033. The requirement of "willfulness" is established if the "responsible" person permits funds of the corporation to be paid to other creditors with knowledge that the taxes have not been paid over to the government. *E.g.*, *United States* v. *McCombs*, 30 F.3d 310, 320 (2d Cir. 1994); *Bowlen* v. *United States*, 956 F.2d 723, 729 (7th Cir. 1992); *Emshwiller* v. *United States*, 565 F.2d 1042, 1045 (8th Cir. 1977); *Davis* v. *United States*, 961 F.2d at 871.

b. Petitioner was the president and a director of HBP. Acting in those capacities, he negotiated financing on behalf of HBP and entered into the credit arrangement with the Bank (Pet. App. A2-A3, A8). He was also the president and a director and shareholder of the Heritage Corporation, which owned all of the stock of HBP (*ibid.*). Petitioner contends that the

control that he granted to the Bank over the finances of HBP absolved him of the responsibility that he otherwise unquestionably had for paying over withheld taxes to the government. The court of appeals correctly held, however, that "a corporate officer may not escape liability as a 'responsible person' under § 6672 by voluntarily entering into agreements which permit preferring other creditors to the government" (Pet. App. A13). Because "the Bank was able to seize control of HBP's finances only because [petitioner], acting as president of HBP, entered into the Agreement which provided the Bank the opportunity to do so," the court concluded that petitioner "participated in the arrangement which gave rise to the failure to pay HBP's taxes" and therefore remained "responsible" for the payment of withheld taxes under Section 6672 (Pet. App. A18). The court further held that, because petitioner paid other creditors during the same period that he knowingly failed to pay withheld taxes to the government, he acted "willfully" within the meaning of the statute (Pet. App. A20-A21).

The holding of the court of appeals—that a "responsible" corporate officer may not absolve his liability under Section 6672 by delegating financial controls to another creditor of the corporation—conforms to well-established precedent. See, *e.g.*, *Commonwealth National Bank* v. *United States*, 665 F.2d 743, 758 (5th Cir. 1982); page 12, *infra*. Indeed, petitioner does not contend that the ruling on the merits in this case conflicts with the decision of any other court. See Pet. 7-9.

2. Instead, without addressing the merits of the decision below, petitioner contends only that the court of appeals applied a standard of appellate review that departs from the standard applied by other courts

of appeals. In particular, petitioner claims (Pet. 7-8) that, in applying a "de novo" standard in reviewing a determination whether a person is "responsible" for paying withheld taxes under Section 6672, the court of appeals departed from the "clearly erroneous" standard that petitioner asserts is applied by other circuits. The conflict in the standard of review that petitioner describes, however, is either nonexistent or insubstantial—it does not exist in substance.

a. In *Taylor* v. *IRS*, 69 F.3d 411 (1995), the Tenth Circuit explained that "factual determinations" are to be reviewed "under the clearly erroneous standard" but that the proper application to such facts of the ultimate statutory standard of liability entails a legal conclusion that must be reviewed "de novo." *Id.* at 415. While findings of basic facts are to be accepted unless "clearly erroneous," "the ultimate determination whether an individual constitutes a 'responsible person' pursuant to § 6672 involves an application of law to fact, which is subject to de novo review" (*ibid.*). The court noted in *Taylor* that at least two other circuits had reached the same conclusion (*ibid.*, citing *Hochstein* v. *United States*, 900 F.2d 543, 547 (2d Cir. 1990); *Thibodeau* v. *United States*, 828 F.2d 1499, 1503 (11th Cir. 1987)). The court further stated in *Taylor*, however, that some other circuits had treated "responsible" person status as an issue of fact, to which a clearly erroneous standard applied (69 F.3d at 415-416, citing *Barnett* v. *IRS*, 988 F.2d 1499, 1504 (5th Cir.), cert denied, 510 U.S. 990 (1993); *Caterino* v. *United States*, 794 F.2d 1, 3 (1st Cir. 1986), cert. denied, 480 U.S. 905 (1987); *Maggy* v. *United States*, 560 F.2d 1372, 1375 (9th Cir. 1977), cert. denied, 439 U.S. 821 (1978)).

Petitioner errs in relying on the description of the case law set forth in the *Taylor* opinion to establish the proposition that a conflict exists among the courts of appeals. The decisions cited by the court of appeals in *Taylor* are all governed by two well-settled, general propositions: (i) that a trial court's findings of fact may be overturned only if they are clearly erroneous but (ii) that the court of appeals is to make a de novo determination of whether the findings of fact satisfy the applicable legal standard and support the trial court's conclusions of law. See *United States* v. *Boyle*, 469 U.S. 241, 249 n.8 (1985). None of the allegedly conflicting decisions departs from these basic principles:

(i) In *Taylor* v. *IRS*, the Tenth Circuit expressly noted that it reviews underlying "factual determinations" only for clear error but conducts a "de novo" review of the "ultimate determination" whether, on the facts thus found, the statutory standard of legal liability for a "responsible" person is met. Accord, *Hochstein* v. *United States*, 900 F.2d at 547; *Thibodeau* v. *United States*, 828 F.2d at 1503.

(ii) In *Barnett* v. *IRS*, the Fifth Circuit explained that, while the existence of "responsible" person status will ordinarily turn on factual determinations, the presence of certain specific facts (such as control over the company and its finances) necessarily establishes that a person is "responsible" as a matter of law. 988 F.2d at 1454. Accord, *Raba* v. *United States*, 977 F.2d 941, 943 (5th Cir. 1992) (describing the "factors" that "determine responsible officer status" such as "holding an office or owning stock in the corporation" and making financial decisions and possessing check-signing authority).

(iii) In *Caterino* v. *United States*, the First Circuit explained that it applies a "clearly erroneous" standard of review for "factual findings" that relate to "the district court's conclusions of responsibility and willfulness." 794 F.2d at 3. The court did not state in *Caterino*, as petitioner implicitly contends, that it would not correct an erroneous application of the legal standards applicable to a determination of responsiblity unless the district court "clearly erred" in its construction of the statute.

(iv) Finally, in *Maggy* v. *United States*, 560 F.2d at 1375, the Ninth Circuit applied a standard of review that is indistinguishable from the review applied by the Tenth Circuit in *Taylor* and in the present case. The court first stated in *Maggy* that "[a] 'responsible person' subject to the reach of 26 U.S.C. §6672 is one who has the final word on which bill should or should not be paid." *Id.* at 1374. Having thus described the applicable legal standard, the court then stated that it would review the trial court's "findings of fact with respect to Maggy's status as a responsible person" for clear error. *Id.* at 1375. On review of the evidentiary record, the court of appeals concluded that the trial court had clearly erred in finding "that Maggy had the final word on what corporate bills were to be paid" (*ibid.*). Because that factual finding was in error, and because (in the court's view) that finding was necessary for Maggy to be "responsible" under the statute, the court of appeals reversed. *Ibid.* Although the decision in *Maggy* contains phrases that can be quoted out of their context for the proposition that a "clearly erroneous" standard of review applies to the ultimate determination of "responsible" person status under Section 6672 (see 560 F.2d at 1375), the appellate review *actually* con-

ducted by the court in that case conforms to the norm—it applies "clearly erroneous" review for findings of fact and "de novo" review to determine whether the findings (that survive clearly erroneous review) support the ultimate legal determination to be made under the statute.

b. The Fifth Circuit—which petitioner contends has adopted the view that "responsible person" status is solely a question of fact (Pet. 8)—has emphasized that courts "cannot ignore the extensive caselaw that narrowly constrains a factfinder's province in § 6672 cases" and that "certain fact patterns will almost invariably prove dispositive of a finding of responsibility." *Barnett* v. *United States*, 988 F.2d at 1454. The other courts on which petitioner relies to establish a conflict with the decision in this case (Pet. 8) have similarly resolved this question as a matter of law when the facts either do not support or instead require the conclusion that "responsible person" status exists. See, *e.g.*, *Thomsen* v. *United States*, 887 F.2d 12, 17 (1st Cir. 1989); *McCray* v. *United States*, 910 F.2d 1289, 1290 (5th Cir. 1990), cert. denied, 499 U.S. 921 (1991); *Morgan* v. *United States*, 937 F.2d 281 (5th Cir. 1991); *Bowen* v. *United States*, 836 F.2d 965 (5th Cir. 1988); *Kinnie* v. *United States*, 994 F.2d 279, 284 (6th Cir. 1993); *Teel* v. *United States*, 529 F.2d 903, 906 (9th Cir. 1976).

As this Court has stated, when a determination of ultimate legal liability entails underlying factual inquiries, "the courts of appeals should not be reluctant to formulate a clear rule of law to deal with" recurring situations. *United States* v. *Boyle*, 469 U.S. at 249 n.8. In the context of the present case, the courts of appeals have uniformly formulated, as "a clear rule of law," the guiding principle that a person who is

"responsible" for paying over withheld taxes cannot escape his liability by delegating his responsibility. *E.g.*, *United States* v. *McCombs*, 30 F.3d at 320; *Kinnie* v. *United States*, 994 F.2d at 284; *Thomsen* v. *United States*, 887 F.2d at 17; *Gustin* v. *United States*, 876 F.2d 485, 491-492 (5th Cir. 1989); *Kizzier* v. *United States*, 598 F.2d 1128, 1132 (8th Cir. 1978); *Purcell* v. *United States*, 1 F.3d 932, 939 (9th Cir. 1993); *George* v. *United States*, 819 F.2d at 1011. The courts have also uniformly agreed that neither a threat of adverse action nor direct instructions from another person can relieve a person who is otherwise "responsible" for the payment of withheld taxes from liability under Section 6672. *E.g.*, *Brounstein* v. *United States*, 979 F.2d 952, 955 (3d Cir. 1992); *Howard* v. *United States*, 711 F.2d 729, 734 (5th Cir. 1983); *Gephart* v. *United States*, 818 F.2d 469, 475 (6th Cir. 1987); *Roth* v. *United States*, 779 F.2d 1567, 1571-1572 (11th Cir. 1986).

In the present case, the court of appeals applied another clear rule of law that correctly deals with a recurring situation. The court held that "a corporate officer may not escape liability as a 'responsible person' under § 6672 by voluntarily entering into agreements which permit preferring other creditors to the government" (Pet. App. A13). That same conclusion has consistently been reached in other circuits. See, *e.g.*, *Commonwealth National Bank of Dallas* v. *United States*, 665 F.2d at 758; *Kalb* v. *United States*, 505 F.2d 506, 510 (2d Cir. 1974), cert. denied, 421 U.S. 979 (1975).[2] Further review is therefore not warranted.

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[2] As the court of appeals observed (Pet. App. A16 & n.6), *Alsheskie* v. *United States*, 31 F.3d 837 (9th Cir. 1994),

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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involved different circumstances. The corporate officer in *Alsheskie* had no involvement in the original negotiations of the defaulting corporation to obtain the financing agreement that ultimately resulted in the ceding of authority to the lender. 31 F.3d at 838. Indeed, he did not become an officer until after (i) the corporation had defaulted on its financing contract, (ii) the lender took possession of the assets of the corporation pursuant to the security agreement and (iii) a new corporation had been formed to hold the assets of the defaulting corporation. *Ibid.* Unlike petitioner, the officer in *Alsheskie* did not "voluntarily enter[] into agreements which permit preferring other creditors to the government" (Pet. App. A13). The agreements had been entered into by others before he became a corporate officer.